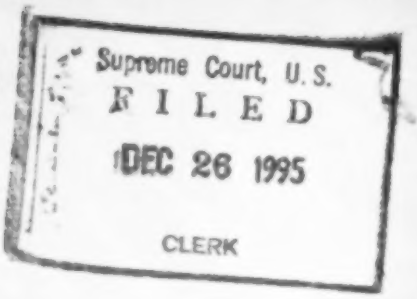
(1) 95-1101



No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

WILLIAM P. WILSON, *Petitioner,*

v.

STATE OF WASHINGTON, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF KING

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29PP

QUESTIONS PRESENTED

William P. Wilson was charged with assault in the fourth degree. On the day of trial, Mr. Wilson entered into a "Stipulation to Facts Sufficient" arrangement. Mr. Wilson's attorney informed him that by signing the stipulation he would avoid a criminal conviction. The trial court reviewed the police report pursuant to the stipulation and entered a finding of guilt. The trial court did not engage in any inquiry with Mr. Wilson to insure that the stipulation was entered into knowingly and voluntarily. The issues are:

1. Whether the trial judge's failure to insure the stipulation was entered into knowingly and voluntarily violated Mr. Wilson's Sixth Amendment right to be confronted with the witnesses against him.

2. Whether the stipulation should be set aside based upon ineffective assistance of counsel.

TABLE OF CONTENTS

QUESTIONS PRESENTED 1
OPINIONS BELOW 6
JURISDICTION 6
CONSTITUTIONAL PROVISION INVOLVED 7
STATEMENT OF THE CASE 8
FEDERAL QUESTION RAISED BELOW 13
REASONS FOR GRANTING THE WRIT 14

I. A conflict exists between the decisions of the states on whether a trial judge must make sure that a stipulation is entered into knowingly and voluntarily in the same manner as required for a plea of guilty 14

II. The failure of Mr. Wilson's attorney to inform him of the consequences of entering into a stipulation amounted to ineffective assistance of counsel 23

CONCLUSION 27
APPENDIX . . . . . by separate cover

TABLE OF AUTHORITIES

Case Law:

Boykin v. Alabama, 395 U.S. 238 (1969) 16, 18

Brookhart v. Janis, 384 U.S. 1 (1966). 20, 21

Bunnell v. Superior Court of Santa Clara County, 531 P.2d 1086 (Cal. 1975). 18

Hill v. Lockhart, 474 U.S. 52 (1985). 24

In Re Mosley, 464 P.2d 473 (Cal 1970) 20, 21

Johnson v. Zerbst., 304 U.S. 458 (1938) 16

Matter of Montoya, 744 P.2d 340 (Wash. 1987) . .17

McCarthy v. United States, 394 U.S. 459 (1969) .16

North Carolina v. Alford, 400 U.S. 25 (1970) . . . 13, 17, 25

People v. Correa, 485 N.E. 2d 307 (Ill. 1985). . . 24

People v. Smith, 319 N.E.2d 760 (Ill. 1974) 18

State v. Avila, 617 P.2d 1137 (Ariz. 1980) 18

State v. Johnson, 705 P.2d 773 (Wash. 1985). . . 14, 18

State v. Stowe, 858 P.2d 267 (Wash.App. 1993). .13, 14, 24, 25

Strickland v. Washington, 466 U.S. 668 (1984). .13, 23

United States v. Russell, 686 F.2d 35 (D.C.Cir. 1982) 24, 25

Constitutional Provisions:
U.S. Const. amend. VI. 7, 13, 15

Court Rules:
Fed. R. Crim. Proc. 11. 17
Wash. CrRLJ 4.2 17

IN THE SUPREME COURT OF THE UNITED STATES

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WILLIAM P. WILSON, *Petitioner,*

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STATE OF WASHINGTON, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF KING

The petitioner, William P. Wilson, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Superior Court for the State of Washington in and for the County of King, entered in the above-entitled proceeding on December 5, 1994.

OPINIONS BELOW

The decision of the Superior Court for the State of Washington in and for the County of King has not been reported but a transcription of the oral decision is reprinted in the Appendix hereto.

The decisions of the Court of Appeals of the State of Washington, Division One, denying discretionary review have not been reported but are reprinted in the Appendix hereto.

The decisions of the Supreme Court of Washington denying discretionary review have not been reported but are reprinted in the Appendix hereto.

JURISDICTION

The decision of the Superior Court for the State of Washington, County of King, was entered on December 5, 1994, affirming the District Court's finding of guilt and denying petitioner's Motion to Vacate Finding and Reinstate

Jury Trial. The commissioner for the Court of Appeals denied a timely Motion for Discretionary Review on April 3, 1995. On June 2, 1995, a panel of three judges from the Court of Appeals denied petitioner's Motion to Modify their commissioner's decision. The commissioner for the Supreme Court for the State of Washington denied a timely Motion for Discretionary review of the Court of Appeals decision to deny review on August 11, 1995. On October 4, 1995, a panel of five judges for the Supreme Court denied petitioner's Motion to Modify their commissioner's ruling.

The jurisdiction of this Court to review the judgment of the Superior Court is invoked under 28 U.S.C §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law,

and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

On October 21, 1993, Mr. Wilson was arraigned on a charge of assault in the fourth degree. On the day in question, Mr. Wilson and his wife, Jenny, became involved in an argument which escalated and resulted in the assault charge against Mr. Wilson. The parties were involved in divorce proceedings at the time. There were no other witnesses to the incident.

After learning of the charge against him, Mr. Wilson hired Mr. Phillip Miller to represent him. On the day of trial, January 13, 1994, Mr. Wilson and his attorney appeared; however, the state's witnesses were not present and/or ready to proceed to trial. Nevertheless, Mr. Miller and the prosecuting attorney chose to proceed by way of Stipulation

to Facts Sufficient, (hereinafter referred to as "stipulation") sometimes imprecisely and incorrectly referred to as an *"Alford plea"* in local district court practice. **See A-1, Stipulation.**

Mr. Miller advised Mr. Wilson to sign the stipulation, but did not explain the terms and effect of such an arrangement. Mr. Wilson was not advised that signing the stipulation would most likely result in a finding of guilt and that, as a result, he would carry a criminal conviction on his record. In fact, it was Mr. Wilson's understanding that by signing the document he would **avoid** a conviction, and only be required to attend and complete anger management counseling. Although Mr. Wilson's signature appears on the stipulation form, he did not understand or agree to proceed with the plea, and did not agree to the sentencing conditions printed on the form.

On the day of trial, the Honorable Pro Tem Judge Rusden presided. The record below indicates that Judge Rusden understood that Mr. Wilson was stipulating that there were

facts sufficient to enter a finding of guilt. Judge Rusden stated,

> *. . . I have previously reviewed the police report and [am] satisfied that there is sufficient evidence contained therein to make a finding of guilty.*

See A-2, Record of Proceedings, page 2.

The court docket also indicates, "*Defendant stipulated to facts sufficient to enter a finding of guilty.*"

Pro Tem Judge Rusden made no attempt to explain to Mr. Wilson the ultimate effect of entering into the stipulation, specifically, that he was giving up his right to a trial, his right to cross-examine witnesses, and that, in all probability, the court would enter a finding of guilt based on the stipulation, which would result in a criminal conviction. **See A-2, Record of Proceedings.**

After reviewing the police reports, the court entered a finding of guilt and ordered a deferred sentence for 18 months, with conditional requirements that Mr. Wilson pay a fine, attend and complete anger management classes, have no subsequent violations of the law and comply with the terms of his probation. **See A-1, Stipulation.**

Following sentencing, Mr. Wilson obtained the undersigned counsel and subsequently filed a Motion to Vacate Finding and Reinstate Right to Jury Trial. On May 19, 1994, the Honorable Judge Pro Tem Sullivan denied the motion to vacate the conviction, but ruled that Mr. Wilson could perfect an appeal of the conviction within 14 days of his decision.

On June 1, 1994, Mr. Wilson appealed to the King County Superior Court. On December 5, 1994, a hearing was held before the Honorable Judge Ricardo Martinez. Judge Martinez affirmed the trial court's finding of guilt. **See A-3, Decision on RALJ Appeal.**

On December 30, 1994, Mr. Wilson sought discretionary review of the trial court's decision to the Court of Appeals, Division One. On April 3, 1995, Court Commissioner James M. Verellen denied Mr. Wilson's Motion for Discretionary Review. **See A-4, Commissioner's Ruling Denying Review.** Mr. Wilson then filed a Motion to Modify the commissioner's ruling and on June 2, 1995, a panel of three judges of the Court of Appeals denied the motion. **See A-5, Judge's Ruling Denying Motion.**

Mr. Wilson then sought discretionary review by the Washington State Supreme Court of the Court of Appeals' refusal to review Judge Martinez's decision. On August 11, 1995, the Commissioner for the Supreme Court denied the motion and refused to review the decision. **See A-6, SC Commissioner's Ruling Denying Review.** Mr. Wilson then made a Motion to Modify the commissioner's ruling. On October 4, 1995, this motion was denied. **See A-7, SC Judge's Ruling Denying Review.**

FEDERAL QUESTION RAISED BELOW

The constitutional rights afforded Mr. Wilson under the Sixth Amendment of the United States Constitution were raised at every level of the state court appeal process.

Mr. Wilson, in his briefing and oral argument before the King County Superior Court, cited **Strickland v. Washington**, 466 U.S. 668 (1984), in support of his claim of ineffective assistance of counsel. Mr. Wilson also relied upon **State v. Stowe**, 858 P.2d 267 (Wash. 1993), which interpreted the Court's decision in **North Carolina v. Alford**, 400 U.S. 25 (1970) with respect to *Alford* pleas and constitutional rights afforded defendants when entering "straight" guilty pleas. Mr. Wilson also made reference to state law and local rules of procedure at the District Court trial level.

At the Court of Appeals level, Mr. Wilson reiterated his Sixth Amendment claims under **Strickland** (supra) and **Alford**, (supra) and incorporating and distinguishing

Washington state decisions under Stowe (supra) and State v. Johnson, 705 P.2d 773 (Wash. 1985), with respect to the rights afforded defendants on guilty pleas.

At the Washington State Supreme Court, Mr. Wilson again raised the Sixth Amendment issue on the same grounds and case law authority.

REASONS FOR GRANTING THE WRIT

I.

A conflict exists between the decisions of the states on whether a trial judge must make sure that a stipulation is entered into knowingly and voluntarily in the same manner as required for a plea of guilty.

It is the fundamental constitutional right of a person accused of a crime to plead not guilty to the charge and have a trial by a jury of his peers wherein he can defend himself by confronting and cross-examining witnesses against him and by

presenting witnesses in his own behalf. **U.S. Const. Amend. VI.**

A defendant may waive this right in whole or in part. However, because of the important and fundamental nature of these rights, it cannot be presumed that a waiver is made knowingly and voluntarily from a silent record, as we have in this case. One example of such a waiver occurs where a defendant pleas guilty to the charges against him. In the context of guilty pleas, this Court stated:

> *A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process clause, it must be 'an intentional abandonment of a known right or*

> *privilege.'* **Johnson v. Zerbst**, 304 U.S. 458, 464 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. See **McCarthy v. United States**, 394 U.S. 459 (1969).

This Court clarified this issue further in **Boykin v. Alabama**, 395 U.S. 238 (1969). In **Boykin**, the defendant pleaded guilty to the charge of common law robbery. There was no evidence on the record that the judge questioned the defendant or that the defendant addressed the Court. The Court held that when a defendant enters a plea of guilty, the trial judge must make sure that he has a full understanding of what the plea connotes and its consequences. The trial court must question the defendant on the record to ensure that the defendant is entering his plea knowingly and voluntarily. **Id.** This requirement has been codified in various criminal procedure rules requiring the court to canvass the accused on the record as to the import and consequences of a proposed

guilty plea. See, e.g. Wash. CrRLJ 4.2; Fed. R. Crim. Proc. 11.

Similarly, when a defendant enters an *Alford plea*, the court is under a duty to insure that the plea is voluntary, knowing and intelligent. North Carolina v. Alford, 400 U.S. 25 (1970).

In an *Alford plea*, a defendant pleads guilty without admitting guilt. The defendant usually does this because he is either unable to admit guilt or wishes to take advantage of a plea bargain offered by the prosecutor. The trial judge must then determine that the state has sufficient evidence to present a prima facie case - the factual basis for the plea. This is usually done by reviewing the police report. In the case of an *Alford plea*, it is the responsibility of the trial judge to canvass the defendant on the record with regard to the decision to enter into the arrangement. See Matter of Montoya, 744 P.2d 340 (Wash. 1987). This requirement insures that reviewing courts are not left to second guess whether the defendant's decision is voluntary and knowing in the face of a

barren record. When the judge discharges that function, *"he leaves a record adequate for any review that may later be sought . . . and forestalls the spin-off of collateral proceedings that seek to probe murky memories."* **Boykin**, at 244.

Courts are divided, however, over whether the safeguards which are applicable to the acceptance of guilty pleas and *Alford* pleas must be provided to a defendant who submits the case to the judge on the basis of a stipulation as to certain evidence. **See Bunnell v. Superior Court of Santa Clara County**, 531 P.2d 1086 (Cal. 1975)(holding safeguards are applicable); **State v. Johnson**, 705 P.2d 773 (Wash. 1985)(holding safeguards inapplicable); **People v. Smith**, 319 N.E.2d 760 (Ill. 1974)(holding safeguards applicable); **State v. Avila**, 617 P.2d 1137 (Ariz. 1980)(holding safeguards inapplicable).

A typical stipulation occurs when the defendant stipulates to the police report and allows the Judge to make a finding of guilt or innocence based on the report. A

defendant who enters into such a stipulation waives the right to present evidence and witnesses on his own behalf and to cross-examine the witnesses against him. Like an *Alford plea*, the court ensures that there is a factual basis for a finding of guilt by reviewing the police report.

A stipulation under circumstances such as Mr. Wilson's is effectively tantamount to a plea of guilty. In fact, the distinction between a stipulation and an *Alford plea* has become so blurred that the terms are often used interchangeably by both attorneys and judges. The two procedures are essentially treated identically. For example, Mr. Wilson's stipulation was recorded in the court docket as *"Defendant stipulated to facts sufficient to enter a finding of guilty."* [emphasis added]. The trial judge reviewed the police report, just as he would have if an *Alford plea* had been entered, and after reviewing the report, entered a finding of guilt.

The United States Supreme Court has never reached the issue of whether the safeguards required for guilty pleas and

Alford pleas should be put in place for stipulations. However, in **Brookhart v. Janis**, 384 U.S. 1 (1966), the Court considered a very similar issue.

In **Brookhart**, an Ohio defendant was charged with forgery. The defendant entered a plea of not guilty and was appointed counsel. On the day of trial, the matter was submitted on a "prima facie case" - a procedure in Ohio whereby the defendant apparently agrees that he will be found guilty if the prosecution can produce legally sufficient evidence of guilt. Under the Ohio procedure, the defendant also agrees that he will neither present his own witnesses nor cross-examine the prosecution's witnesses. In **Brookhart**, the defendant specifically stated on the record that in no way was he pleading guilty to the charge. **Id.**, cited in **In Re Mosley**, 464 P.2d 473 (1970) at 477. In response to the defendant's statement, the trial court questioned the defendant as to exactly how he wished to proceed. The defendant's attorney affirmed that they were seeking only the prima facie procedure and not a full trial. This Court

characterized the prima facie case procedure in **Brookhart** as *"the practical equivalent of a plea of guilty."* **Id.** The Court reasoned that because a defendant's agreement to the prima facie procedure amounted to a plea of guilty, the same safeguards in place for guilty pleas should apply to Ohio's prima facie procedure. **Id.** at 481. The Court held that the record did not indicate that the client had voluntarily waived his right to a full trial and, as a result, the guilty verdict was unconstitutionally obtained. **Id.** at 478.

The stipulation entered into by Mr. Wilson has many of the same elements as the constitutionally impermissible procedure at issue in **Brookhart**. Mr. Wilson's stipulation still required the prosecution to prove that a crime had been committed. However, Mr. Wilson waived his right to produce witnesses on his own behalf and to cross examine the witnesses against him. Even more dramatic than the defendant in **Brookhart**, Mr. Wilson also waived the requirement that the state actually produce a witness for live testimony. The stipulation limited the evidence considered by the trial judge to the bare, written police report, and was, for

all intents and purposes, the practical equivalent of a plea of guilty. Because the practical effect of a stipulation is the same as a plea of guilt, the constitutional safeguards put in place by this Court in the context of guilty pleas should be made equally applicable to stipulations.

With the steady increase in the number of criminal cases being brought, the stipulation procedure has become an increasingly common method of resolving criminal matters short of trial. However, the confusion in the states' interpretation of the requirements of the Sixth and Fourteenth amendments has resulted in conflicting procedures from state to state. States which have held that no safeguards apply to stipulations are directly at odds not only with other states, but with the previous decisions of this Court and the constitutional safeguards of the Sixth amendment.

Because of the differing standards between the states, and because Mr. Wilson was not afforded rights other defendants in the same situation have been given, consideration of this matter by this Court is essential.

II.

The failure of Mr. Wilson's attorney to inform him of the consequences of entering into a stipulation amounted to ineffective assistance of counsel.

The test for ineffective assistance of counsel is whether (1) defense counsel's performance fell below and objective standard of reasonableness, and (2) whether this deficiency prejudiced the defendant. **Strickland v. Washington**, 466 U.S. 668 (1984). As to the first prong, there is a strong presumption of adequate assistance of counsel. **Id.** at 689. As to the second, there must be a showing that there is "a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." **Id.** at 694.

The primary role of an attorney representing a criminal defendant is to insure his client makes informed decisions. For example, the attorney must make sure that the defendant enters into plea negotiations or other agreements knowingly

and voluntarily. **Hill v. Lockhart**, 474 U.S. 52 (1985). Where an attorney affirmatively misinforms his client of the consequences of a plea or other agreement, the attorney's performance falls below an objective standard of reasonableness. **United States v. Russell**, 686 F.2d 35 (D.C.Cir. 1982); **People v. Correa**, 485 N.E. 2d 307 (Ill. 1985)(counsel's erroneous misrepresentation that a guilty plea would not affect defendant's immigrant status was ineffective assistance and rendered guilty plea involuntary); **State v. Stowe**, 858 P.2d 267 (Wash.App. 1993)(counsel's erroneous misrepresentation that *Alford plea* would not result in defendant's discharge from the Army was ineffective assistance of counsel).

An attorney's misrepresentation as to the outcome of an agreement to submit the case to the judge on the basis of stipulated evidence is particularly problematic. A defendant may voluntarily, knowingly and understandingly agree to submit his case to the trial judge based on stipulated evidence, even if he is unwilling to acknowledge his involvement in a

crime. See, e.g. North Carolina v. Alford, 400 U.S. 25, 37 (1970). However, when such a defendant learns that his stipulation will have consequences of an unquestionably serious nature, and thus rapidly changes his calculations about the costs and benefits of waiving his right to trial, it may be manifestly unjust to hold the defendant to his earlier bargain. Russell, 686 F.2d at 40; Stowe, 858 P.2d at 270.

In this case, Mr. Wilson steadfastly maintained his innocence throughout the criminal proceedings. Mr. Wilson agreed to sign the stipulation based on his understanding that *there would be no conviction of the crime charged.* While there is little evidence of precisely what advice Mr. Miller gave his client, it is clear that Mr. Wilson was not made to understand the consequences of his actions, either by his counsel or by the trial judge. Mr. Wilson signed the stipulation without understanding and believing, in fact, that agreeing to the arrangement would have a completely different effect. Mr. Miller's failure to insure his client understood the true consequences of a stipulation falls below an objective standard of reasonableness and constitutes

deficient performance.

Mr. Wilson was seriously prejudiced by his counsel's advice. While Mr. Wilson did not receive a prison sentence, he now has a record of a criminal conviction for assault, which he considers a serious blot on his character. The assault conviction was also later used as a bargaining tool by his former wife in the context of their dissolution. Mr. Wilson suffered extreme embarrassment, depression, and a great deal of anxiety due to the guilty finding. Mr. Miller should have advised his client **not** to sign the stipulation, and to proceed with the scheduled jury trial.

In this particular case, advising Mr. Wilson to sign a stipulation was inappropriate, considering his clear insistence on his innocence and his strong desire to maintain a clean record. Further, the attorney should have moved for a dismissal, as the state's witnesses were not present and/or ready for trial. Proceeding to a jury trial would have allowed Mr. Wilson to maintain his innocence, seek dismissal and ultimately clear his name.

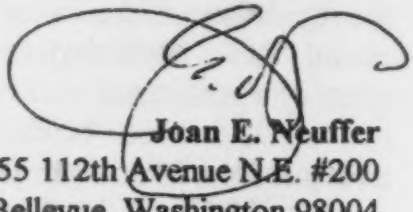
CONCLUSION

Mr. Wilson was denied his constitutional right of protection under the Sixth Amendment when he entered into the stipulation which resulted in a criminal conviction on his record. In not explaining his rights adequately, Mr. Wilson's attorney's performance fell below the constitutionally permissible standard. Neither was Mr. Wilson provided with an explanation of his rights by the trial judge.

This Court must ensure that the states apply constitutional rights afforded under the Sixth Amendment consistently, specifically when a defendant is making a plea of guilty. These rights must be granted to all defendants when pleading guilty, regardless of whether the plea is made through an *Alford plea* arrangement, or by stipulation to facts contained in a police report.

For these reasons, this Court should grant Mr. Wilson's Petition for Writ of Certiorari, and allow him his day in court.

Respectfully Submitted,



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Counsel of Record

95-1101

Supreme Court, U.S.
FILED
DEC 28 1995
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

WILLIAM P. WILSON, *Petitioner,*

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STATE OF WASHINGTON, *Respondent.*

APPENDIX

to the

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF KING

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38 pp

APPENDIX
Table of Contents

Document	Appendix No.
Stipulation to Facts Sufficient, dated January 13, 1994	1
Record of Proceedings at Trial on January 13, 1994	2
Decision on RALJ Appeal, dated December 5, 1995	3
Commissioner's Ruling Denying Motion for Discretionary Review, dated April 3, 1995	4
Judge's Ruling Denying Motion to Modify, dated June 2, 1995	5
Supreme Court Commissioner's Ruling Denying Review, dated August 11, 1995	6
Supreme Court Judge's Ruling Denying Review, dated October 4, 1995	7

State of Washington
Issaquah Division
640 N.W. Gilman Blvd.
Issaquah, WA 98027
296-7688

STATE OF WASHINGTON,	)	
	)	**Case No. L098433**
Plaintiff,	)	
	)	**Stipulation to**
v.	)	**Facts Sufficient**
	)	
WILLIAM P. WILSON,	)	
	)	
Defendant.	)	
_____	)	

I am the defendant in this case. I wish to submit the case on the record. I understand that this means that the

Judge will read the police report and other material attached and, based upon that evidence the judge will decide if I am guilty of the crime(s) of **Assault 4th Degree, DV.**

I understand that, by this process, I am giving up the constitutional right to a jury trial, the right to hear and question witnesses, the right to call witnesses in my own behalf, and the right to testify or not to testify.

I understand that the maximum sentence for the crime(s) is **one year jail/$5000.00 fine.**

I have been informed and fully understand that the crime(s) with which I am charged carries a mandatory minimum sentence(s) of: **N/A,** and that the judge can impose any sentence up to the maximum, no matter what the prosecuting authority or the defense recommends.

No one has made any threats or promises to get me to submit this case other than the prosecuting authority's

promise to take the following action and/or make the following recommendations:

18 months deferred sentence, no criminal law violations, active probation with King County, Domestic Violence Counseling with Dr. Philip Cohen or another counselor recommended by him, unless not approved by Probation with good cause. If not approved, then an approved domestic violence program. Jail time suspended, $4900 fine suspended. If all conditions are fully satisfied, the case will be dismissed at the end of 18 months.

Dated this 13th day of January, 1994.

/s/ William P. Wilson
Defendant

/s/ Phillip Miller
Lawyer for Defendant

/s/ Gwynne Skinner
For the Prosecuting Attorney

/s/ Judge Rusden
Pro Tem Judge Presiding

IN THE KING COUNTY DISTRICT COURT
ISSAQUAH DIVISION

STATE OF WASHINGTON,	)	
	)	**No. L098433**
Plaintiff,	)	
	)	**RECORD OF**
vs.	)	**PROCEEDINGS**
	)	
WILLIAM P. WILSON,	)	
	)	
Defendant.	)	
	)	

RECORD OF PROCEEDINGS

Attorney for Plaintiff: **Gwynne Skinner**
Attorney for Defendant: **Phillip Miller**

Before the Honorable **James Rusden**, Judge Pro Tem.

Transcriber
Holly Benson

(Tape Number 94A08)
Judge Rusden: This is the matter of the State of Washington v. William P. Wilson cause No. 98433. I understand this matter has been resolved by stipulation is that correct?
Skinner: Yes, your Honor.
Miller: That's correct your honor. My name is Phillip **Miller,** I represent Mr. Wilson [to my] right.
Skinner: I am here representing the State of Washington.
Judge Rusden: Do you have the order to . . .
Skinner: We also ask that the Police Report be marked be and admitted to evidence.
Miller: No objection.
Judge Rusden: I have previously reviewed the police report and satisfied that there is sufficient evidence contained herein to make the finding of guilty. I have reviewed the ah,

stipulation ah, prepared by the counsel and signed by the Defendant and will prove the same. It has been the agreement of ah the parties that this sentencing of this matter be deferred for the period of 18 months based on certain conditions that are noted in the stipulation. For the record I will run through those, the court will defer the imposition of sentencing of this matter for the period of 18 months the sentence of the court is deferring is that of the 90 days jail sentence and $500 fine just so that the counsel and defendant knows though what the outside incidents of this are the conditions of the deferral of this sentence will be that the defendant pay the sum of $100.00 to include costs and assessments, that there be no violations of law during this 18 month period, that the probation department take active interest in this matter during the time of the deferred sentence.

But primarily for the purpose of reviewing what I assume is going to be a report from Dr. Phillip Cohen outlining his plan and program and unless they specifically disapprove of that plan I will make it a condition that the

deferred sentence that the defendant continue his counseling with Dr. Phillip Cohen, follow all his instructions until such time as he indicates that no further counseling is necessary. If it turns out that the probation department for some reason disapproves of this, than we will return here for review of optional counseling.

The parties have listed some higher numbers here than I announced but I would think that the certain nature of this case that the amounts that I indicated will probably be sufficient attention getting under the circumstances. Unless the State strongly feels to the contrary.
Skinner: Your Honor, the defense counsel wanted to include that portion so. . .
Miller: Simple oversight on my party on the dollar amount
Judge Rusden: I note that you indicate also that (unintelligible), was there some reason to think that Dr. Cohen was not going to be available or was that the way the program was going at this point.

Miller: We are not sure about Dr. Cohen's long term availability because we have not had an opportunity to speak with him and so that was a just to make sure that we could get someone . . .

Judge Rusden: So you could go to other counseling, that's fine, that be approved by court with same approval by probation. As noted here that the whole purpose of deferred sentence is so that this matter can be dismissed at end of the deferral period and be removed from any criminal record. So it is the responsibility of the defendant that the end of the time once these other conditions have been met, to note this up on a motion calendar so that the court can be formally advised that all conditions have been met in this matter so that it may then be dismissed. The courts dismissal is on the condition of meeting these requirements. Any other matters that need to be covered, any questions.

Skinner: No, your Honor.

Miller: No, your Honor.

Judge Rusden: I have signed the order and that will resolve this matter here today.

I certify, under penalty of perjury of the laws of the State of Washington, that the foregoing is true and correct to the best of my ability.

Dated this 31st day of April, 1994, in Bellevue, Washington.

/s/ Holly Benson
Holly Benson
Transcriber

SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON	)	
	)	**NO. 94-1-03624-2**
Plaintiff,	)	
	)	**DECISION ON**
v.	)	**RALJ APPEAL**
	)	
WILLIAM WILSON,	)	**(Clerk's Action**
	)	**Required)**
Defendant.	)	
	)	

This appeal come on regularly for oral argument on December 5, 1994, pursuant to RALJ 8.3, before the undersigned Judge of the above entitled court and after reviewing the record on appeal and considering the written and oral argument of the parties, the court holds the following:

Reasoning Regarding Assignment of Error:

The defendant did not enter into a guilty plea, but a stipulation. The court did not abuse its discretion in accepting the stipulation. Defense Counsel's representation did not give rise to a claim of ineffective assistance of counsel. The trial court's finding of guilt shall therefore be affirmed and the matter remanded for sentencing.

IT IS HEREBY ORDERED that the above cause is:
[X] AFFIRMED; [ ] REVERSED; [ ] MODIFIED;
COSTS
REMANDED to Issaquah District Court for further proceedings, in accordance with the above decision and that the Superior Court Clerk is directed to release any bonds to the Lower Court after assessing statutory Clerk's fees and costs.

Dated: 12/5/95

/s/ Ricardo S. Martinez
Superior Court Judge

Approved as to form:

/s/ Joan E. Neuffer
Counsel for Appellant (Wilson)

/s/ Nancy Zaragoza
Counsel for Respondent (Prosecutor)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION ONE

STATE OF WASHINGTON,	)	
	)	**No. 35842-1-I**
Respondent,	)	
	)	**COMMISSIONER'S**
	)	**RULING DENYING**
vs.	)	**DISCRETIONARY**
	)	**REVIEW**
WILLIAM P. WILSON,	)	
	)	
Appellant.	)	
	)	

William Wilson seeks discretionary review of the RALJ court order affirming his conviction for fourth degree assault. The motion for discretionary review was heard on March 24, 1995.

FACTS

Wilson was charged with fourth degree assault related to a domestic dispute. He and his attorney appeared on the date set for trial. Wilson executed a "Stipulation to Facts" which provided:

> **I am the defendant in this case. I wish to submit the case on the record. I understand that this means that the judge will read the police report and other materials attached and, based upon that evidence the judge will decide if I am guilty of the crime(s) of assault fourth degree DV.**
>
> **I understand that, by this process, I am giving up the constitutional right to a jury trial, the right to hear and question witnesses, the right to call witnesses in my own behalf, and the right to testify or not to testify.**
>
> **I understand that the maximum sentence for the crime(s) is 1 year jail/$5000.00 fine.**

I have been informed and fully understand that the crime(s) with which I am charged carries a mandatory minimum sentence(s) of n/a and that the judge can impose any sentence up to the maximum, no matter what the prosecuting authority or the defense recommends.

No one has made any threats or promises to get me to submit this case other than the prosecuting authority's promise to take the following action and/or make the following recommendations: 18 months deferred sentence/no criminal law violations/active probation with King County Domestic Violence counseling with Dr. Phillip Cohen or another counselor recommended by him, unless not approved by Probation with good cause. If no approved, then an approved domestic violence program. Jail time suspended; $4900 fine suspended. If all conditions are fully satisfied, the case will be dismissed at the end of 18 months.

The trial judge did not undertake any colloquy with Wilson regarding his understanding of the stipulation. The trial court considered the police reports and determined that they were sufficient to support a finding of guilty. The trial court ordered a deferred sentence for 18 months with the conditions contained upon the stipulation.

Following sentencing, Wilson obtained new counsel and filed a motion to vacate and to reinstate his right to a jury trial. He filed an affidavit reciting that he was advised by his attorney that by signing the stipulation he would be allowed to undertake counseling and to avoid a conviction, and that the trial court said nothing to him about his rights. The motion to vacate was denied but Wilson was granted leave to file a RALJ appeal even though the 14-day time for filing an appeal had expired. The RALJ court affirmed his conviction and he seeks discretionary review.

ISSUE

1. Should the requirements of CrRLJ 4.2 regarding pleas of guilty be extended to the stipulation?

2. Did the defendant receive ineffective assistance of counsel?

CRITERIA FOR DISCRETIONARY REVIEW

Discretionary review is only available:

(1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court: or

(2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(3) If the decision involves an issue of public interest which should be determined by an appellate court; or

(4) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.

DECISION

Issue 1. Wilson argues that the stipulation was a "stipulation of facts sufficient," and as used in district court practice is the functional equivalent of an **Alford***[1]* plea, and therefore should be subject to the same requirements of CrRLJ 4.2 that apply to guilty pleas. Wilson acknowledges that under current law the court is not required to insure that a stipulation is entered into knowingly and voluntarily. In ***State v. Johnson***, 104 Wn.2d 338, 342-3, 705 P.2d 773(1985), the court expressly rejected the argument that a stipulated facts trial was tantamount to a guilty plea and held that no advise of rights or colloquy was required. Subsequent cases continue to recognize the distinctions between stipulated facts trials and guilty pleas and that the requirements of CrR 4.2 do not apply to stipulated facts trials. See ***State v. Mierz***, 72 Wn. App. 783, 796, 866 P.2d 65, 875 P.2d 1228, ***review granted***, 125 Wn.2d 1007 (1994) ("A stipulated trial is fundamentally different from entering a guilty plea. Because these two procedures are not analogous, we hold that CrR 4.2, a rule that by its terms applies to guilty pleas, does not apply to a stipulated

[1] North Carolina v. Alford, 400 U.S. 25 (1970)

trial." (Footnote omitted.))

An ***Alford plea*** is a plea of guilty made when the defendant is unable or unwilling to admit that he participated in the acts constituting the crime. This form of guilty plea requires that the trial court take steps to confirm that the plea is knowing, intelligent and voluntary. ***In re Montoya***, 109 Wn.2d 270, 277, 744 P.2d 340 (1987). Wilson argues that the distinctions between ***Alford*** pleas and stipulations to facts has become blurred, especially in district court practice. There remains, however, a significant difference between admitting guilt and waiving any right to appeal and a stipulated facts trial in which the trial court determines guilt or innocence based upon the stipulated facts and the right to appeal is retained. While it is not clear how the stipulated facts trial operated any differently for Wilson than a guilty plea, the written stipulation signed by Wilson, clearly and unambiguously indicates that a stipulated facts trial will be conducted. The document is not tantamount to an ***Alford*** plea and CrRLJ 4.2 does not apply to the stipulation. The record presented in support of the motion for discretionary review reflects that after the stipulation was presented, the trial court entered a finding of guilty

based upon the police reports, not upon a guilty plea of Wilson. The trial court was not required to engage in the inquiry required by CrRLJ 4.2.

Issue 2. Wilson argues that he received ineffective assistance of counsel because he was not fully advised of the consequences of signing the stipulation and because his attorney did not negotiate a resolution that did not include a conviction upon his record.

To establish ineffective assistance of counsel, the defendant must meet a two-pronged test. ***Strickland v. Washington***, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); ***State v. Thomas***, 109 Wn.2d 222, 743 P.2d 816 (1987). First, the defendant must show that counsel's performance was deficient. ***Strickland v. Washington, supra*** at 687; ***State V. Thomas, supra*** at 225. The quality of counsel's representation is determined by reference to "an objective standard of reasonableness based on consideration of all of the circumstances." ***State v. Thomas, supra*** at 226. Appellate review of counsel's performance is highly deferential and there is a strong presumption that the performance was reasonable.

State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990); *State v. Thomas, supra* at 226. If defense counsel's conduct can be characterized as a legitimate trial strategy or tactics, ineffective assistance will not be found. *State v. Mak*, 105 Wn.2d 692, 718 P.2d 407, *cert. denied,* 479 U.S. 995 (1986); *State v. Tarica*, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

If the defendant meets his burden of showing that his counsel's performance was deficient, the court then must consider whether the ineffective performance prejudiced the defense. *Strickland v. Washington, supra* at 687; *State v. Thomas, supra* at 225. To satisfy the prejudice prong of the test, the defendant must show that, "but for the ineffective assistance, there is a reasonable probability that the outcome would have been different". *State v. Bowerman, supra* at 808. A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State. V. Tarica, supra* at 374; *State v. Fredrick*, 45 Wn. App. 916, 729 P.2d 56 (1986).

Affirmatively misinforming a defendant of the collateral consequences of entering an **Alford** plea may constitute ineffective assistance prejudicial to the defendant, if the defendant shows a reasonable probability that, but for the errors of counsel, defendant would not have pled guilty and would have proceeded to trial. ***State v. Stowe***, 71 Wn. App. 182, 186, 858 P.2d 267 (1993).

Wilson presented his ineffective assistance arguments to the trial court upon his motion to vacate which was supported only be Wilson's Affidavit. The affidavit contains limited comments regarding the advice provided to Wilson at the time the stipulation was entered:

> *3. . . . [My attorney] advised me that I should take the prosecutor's offer and sign a form. He told me by signing this form, it would allow me to go through counseling and avoid a conviction. I did not understand all the provisions of the form, but I signed it anyway, relying upon his advice.*
>
> *4. On the day of trial, I felt very intimidated by the whole*

process. The court said nothing to me regarding my rights. specifically that I was entering a plea of guilty. I understand now that the plea I entered was an "Alford" plea, which allowed the Judge to make a finding of guilt based upon the police reports alone. I did not understand this at the time.

The record presented in support of discretionary review does not provide a complete record of what other material may have been presented to the trial court not any detailed findings of the trial court on the motion to vacate. The State's brief, does quote the trial court as finding that Wilson had not made an adequate showing that he did not understand the stipulation he signed. The only affirmative misinformation referred to in the affidavit was a statement by the attorney that by signing the form a conviction would be avoided. The bare allegation by Wilson that he did not understand what was set forth in the written stipulation does not establish that he received ineffective assistance of counsel. Based upon the limited record presented, Wilson has not established that the trial court erred in rejecting his claim of ineffective assistance of counsel.

Further, to the extent that Wilson argues that the "deal"

contained in the stipulation was not in his best interests, the stipulated facts trial resulted in a deferred sentence with the conviction to be removed from his record if Wilson complies with the conditions imposed. He faced the potential of substantially more severe penalties if he had gone to trial and lost, and the tactical agreement to the stipulated trial with the State's recommendation of a deferred sentence is not shown to be ineffective assistance of counsel. See ***generally Mierz***, 72 Wn. App. at 795 (stipulated trial procedure involving signature of defense attorney approving findings of fact and conclusions of law not ineffective assistance of counsel.) The stipulation is not tantamount to an ***Alford plea*** or a general guilty plea nor does the record reflect ineffective assistance of counsel. The criteria for discretionary review has not been satisfied. Now, therefore, it is hereby **ORDERED** that the motion for discretionary review is denied.

Done this 3rd day of April, 1995.

/s/ James M. Verellen
Court of Appeals Commissioner

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION ONE

STATE OF WASHINGTON	)	
	)	**No. 35842-1-I**
Respondent,	)	
	)	**ORDER DENYING**
vs.	)	**MOTION TO**
	)	**MODIFY**
WILLIAM P. WILSON,	)	
	)	
Appellant.	)	
	)	

William P. Wilson has filed a motion to modify the

comissioner's ruling granting a motion on the merits and affirming the decision of the trial court. A panel of this court has considered the matter pursuant to RAP 17.7 and *State v. Rolax*, 104 Wn.2d 129, 702 P.2d 1185 (1985), and has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion to modify is denied.

Done this 2nd day of June, 1995.

/s/Walter E. Webster
Court of Appeals Judge

/s/Faye C. Kennedy
Court of Appeals Judge

/s/Walter E. Webster
Court of Appeals Judge

SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON	)	
	)	**NO. 62946-3**
Respondent,	)	
	)	**RULING**
vs.	)	**DENYING**
	)	**DISCRETIONARY**
WILLIAM P. WILSON,	)	**REVIEW**
	)	
Petitioner,	)	
	)	

William Wilson moves for discretionary review of the Court of Appeals refusal to review the Superior Court's decision in his RALJ appeal. RAP 2.3(d); RAP 13.5(b).

Mr. Wilson was charged in district court with fourth degree assault (domestic violence). On January 13, 1994, he signed a form submitting the case to the trial court on the record. The form says "I understand that this means that the judge will read the police report and other materials attached and, based on that evidence, the judge will decided if I am guilty" of the crime charged. It also says Mr. Wilson understood the maximum penalty for the crime was 1 year in jail, the court could impose any sentence up to the maximum, and the prosecutor had agreed to recommend an 18-month deferred sentence with active probation and counseling, after which the case would be dismissed. The trial court found that the materials submitted supported a finding of guilt, accepted the prosecutor's sentencing recommendation, and deferred imposition of sentence.

Mr. Wilson later moved to vacate what he characterized as an ***Alford [1]*** plea of guilty. The trial court denied this motion. Mr. Wilson then appealed to King county Superior Court, again claiming that he had entered an invalid ***Alford***

*[1] **North Carolina v. Alford,*** 400 U.S. 25, 27 (1970)

plea. That court held that Mr. Wilson did not plead guilty and affirmed the finding of guilt. Mr. Wilson moved for discretionary review in Division One of the Court of Appeals. Commissioner Verellen denied this motion, and the court declined to modify the commissioner's ruling.

I agree with the courts below the Mr. Wilson did not enter an ***Alford*** plea to the assault charge. An ***Alford*** plea is a type of guilty plea. ***See In re Montoya***, 109 Wn.2d 270, 744 P.2d 340 (1987). As with any guilty plea, an ***Alford*** plea, once accepted, leaves nothing for the court to do but enter judgment. It also waives both the defendant's trial rights and the right to appeal almost all legal issues. ***Id.; see State v. Johnson***, 104 Wn.2d 338, 705 P.2d 773 (1985) (comparing guilty pleas and stipulations). Mr. Wilson simply stipulated that the court could determine his guilt or innocence based on the police reports and other evidence submitted on the record. He did not, as he claims, stipulate that this evidence was sufficient to support a finding of guilt. The court made that determination for itself.

To be sure, the stipulation here was somewhat different from the "stipulated facts trial" this court addressed in ***Johnson***; the latter did not preclude the defendant from presenting evidence or cross-examining the state's witnesses. See ***State v. Johnson, supra***. Nevertheless, like the defendant in ***Johnson***, Mr. Wilson preserved his right to appeal and did not admit that the State's evidence supported a finding of guilt. These factors relevantly distinguish Mr. Wilson's stipulation from a guilty plea. Moreover, Mr. Wilson signed a form stating he understood he was waiving his trial rights. He also acknowledged an understanding of the sentencing consequences of a finding of guilt. Thus, to the extent the stipulation was similar to a guilty plea, the procedures necessary to ensure voluntariness were satisfied.

Mr. Wilson also contends that his trial counsel represented to him ineffectively by telling him that the stipulation would not result in a conviction. That advice, though perhaps incomplete, was nevertheless correct; if Mr. Wilson complies with the terms with his probation, the charge

will be dismissed and he will have no criminal record.

In sum, the Superior Court's RALJ decision does not warrant review under RAP 2.3(d), nor therefore has Mr. Wilson shown that review by this court is merited under RAP 13.5(b). His motion for discretionary review is denied.

/s/ Geoffrey Crooks
Supreme Court Commissioner

August 11, 1995

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	**No. 62946-3**
Respondent,	)	
	)	**ORDER**
v.	)	
	)	**C/A No. 35842-1-I**
WILLIAM P. WILSON,	)	
	)	
Petitioner.	)	
	)	

All five members of Department I of the Court considered the matters set on its October 3, 1995, Motion Calendar, the files herein and unanimously agreed that the following order be entered. Therefore, Chief Justice Barbara Durham directed that this order be entered:

IT IS ORDERED:

That Petitioner's Motion to Modify Commissioner's Ruling is denied.

I CERTIFY THAT THIS ORDER WAS ENTERED BY THE COURT ON THIS 4TH DAY OF OCTOBER, 1995.

/s/ C.J. Merritt
C.J. MERRITT
SUPREME COURT CLERK

DECLARATION OF HOLLY BENSON

I, Holly Benson, declare as follows:

I am the legal assistant for Joan E. Neuffer, Counsel of Record. I have prepared all documents contained within the Appendix for the Petition for Writ of Certiorari, which were a part of the record below.

I have retyped true and accurate copies of each document as they appeared from the original documents, as follows:

1. **Stipulation to Facts Sufficient**, Jan. 13, 1994
2. **Record of Proceedings**, Jan. 13, 1994
3. **Decision on RALJ Appeal**, Dec.5, 1995
4. **Commissioner's Ruling Denying Motion for Discretionary Review**, April 3, 1995
5. **Judge's Ruling Denying Motion to Modify**, June 2, 1995

Appendix
Declaration of Holly Benson

6. **SC Commissioner's Ruling Denying Review**, August 11, 1995
7. **SC Judge's Ruling Denying Review**, Oct. 4, 1995

I SWEAR UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

Dated this 11th day of December, 1995.

Holly Benson

Holly Benson
Legal Assistant

Appendix
Declaration of Holly Benson

(3)

Supreme Court, U. S.
FILED
MAY 6 1996
CLERK

NO. 95-1101

IN THE

Supreme Court of the United States

October Term, 1995

WILLIAM P. WILSON,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF KING

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Senior Prosecuting
Attorney

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58 pp

TABLE OF CONTENTS

Page

A. STATEMENT OF THE CASE 1

B. SUMMARY OF ARGUMENT 4

C. ARGUMENT 5

1. THE PETITIONER'S CONSTITUTIONAL RIGHTS WERE FULLY PROTECTED IN THIS STIPULATED BENCH TRIAL. . 5

a. A Trial On Stipulated Facts Does Not Raise The Same Constitutional Concerns As Does A Plea Of Guilty. 5

i. Washington Supreme Court Precedent. 5

ii. The United States Supreme Court. 7

b. There Is No Conflict Among The State Courts Of Last Resort On Constitutional Issues In The Context Of Stipulated Trials. 9

2. THE PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL IN REACHING A RESOLUTION OF THIS CASE THAT ALLOWED THE CONVICTION TO BE REMOVED FROM HIS RECORD AFTER EIGHTEEN MONTHS OF COMPLIANCE WITH CONDITIONS OF PROBATION. 11

D. CONCLUSION 14

TABLE OF AUTHORITIES

Page

TABLE OF CASES

Washington Cases:

State v. Johnson, 104 Wn.2d 338,
705 P.2d 773 (1985) 5-7

State v. Mierz, 127 Wn.2d 460,
901 P.2d 286 (1995) 7

Other Jurisdictions:

Boykin v. Alabama, 395 U.S. 238,
89 S. Ct. 1709, 23 L. Ed.2d 274 (1969) 6

Brookhart v. Janis, 384 U.S. 1,
86 S. Ct. 1245 (1966) 7, 8

Bunnell v. Superior Court of Santa Clara County,
119 Cal. Rptr. 302, 531 P.2d 1086 (1975) 10, 11

North Carolina v. Alford, 400 U.S. 25,
91 S. Ct. 160, 27 L. Ed.2d 162 (1970) 5

People v. Smith, 59 Ill.2d 236,
319 N.E.2d 760 (1974) 9-11

State v. Avila, 127 Ariz. 21,
617 P.2d 1137 (1980) 11

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed.2d 674 (1984) 12, 13

A. STATEMENT OF THE CASE

The State of Washington charged William Wilson in Issaquah District Court with the crime of Assault in the Fourth Degree (Domestic Violence).[1]

On January 13, 1994, the parties appeared for trial. Mr. Wilson proceeded by way of a stipulated trial to the court. Under this procedure, he agreed to allow the trial judge to read the police report and, based upon that evidence, to decide whether or not he was guilty of the crime charged. See Appendix B (Respondent), Stipulation to Facts.[2]

Based on its review of the facts contained in the police report, the trial court found Mr. Wilson guilty as charged. See Appendix 2 (Petitioner), at 2. The court deferred imposition of sentence for a period of eighteen months, on condition that Mr. Wilson pay a $100 fine, have no violations of law, and complete a program of counseling. See Appendix 2 (Petitioner), at 3-4; Appendix C (Respondent), Order on Judgment, Sentence and Probation for the Crime(s) of: Assault DV.

The State is compelled to point out several material misrepresentations in the Statement of the Case presented in the Petition for a Writ of Certiorari [hereinafter "Petition"].

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[1]The procedural history of Mr. Wilson's appeal is detailed in the Petition for a Writ of Certiorari, and in the Appendix attached thereto.

[2]A copy of the original document has been lodged with the Clerk of the Court.

First of all, Mr. Wilson asserts that the State's witnesses were not present and/or ready to proceed to trial. See Petition, at 8. This assertion is contradicted by the record, wherein the deputy prosecuting attorney represented to the court:

> Indeed we were ready to proceed. The witness had flown in specifically from Chicago on that day to testify. . . . And in any event she was on the phone. She was about ready to come in. Once we reached this agreement we told her she didn't have to, but she was prepared to testify.

Appendix A (Respondent), Report of Proceedings before the Honorable Timothy Sullivan. This assertion by the prosecutor went uncontradicted, by either Mr. Wilson or his attorney.[3]

Next, the State takes issue with Mr. Wilson's claim that the type of stipulation he entered into in this case is commonly referred to as an "Alford plea" in local district court practice. See Petition, at 9, 19. There is nothing in the record to support this statement. Nowhere in the Record of Proceedings taking place on January 13, 1994, do either the attorneys or the judge refer to the stipulation as an "Alford plea," or indeed as anything other than what it was -- a stipulation. See Appendix 2 (Petitioner). Nor does the document itself purport to be an "Alford plea." See Appendix B (Respondent).

---

[3]Mr. Wilson's attorney at the April 22, 1994, hearing was the same attorney who now represents him in his Petition.

Perhaps most importantly, Mr. Wilson materially misrepresents the title of the document he signed on January 13, 1994. Mr. Wilson inexplicably entitles this document "Stipulation to Facts Sufficient." See Appendix 1 (Petitioner). The title of the document is in fact "STATEMENT OF DEFENDANT ON SUBMITTAL OR STIPULATION TO FACTS." See Appendix B (Respondent).[4] The first six words of the title are crossed out on the form that Mr. Wilson signed, leaving "STIPULATION TO FACTS." Nowhere in the title of the document does the critical word "sufficient" appear.

Mr. Wilson further represents that he was never advised that, as a result of a finding of guilt, he would carry a criminal conviction on his record. See Petition, at 9. This characterization is at best incomplete. The prosecuting attorney recommended that sentence be deferred for 18 months, and indicated that, "If all conditions are fully satisfied, the case will be dismissed at the end of 18 months." See Appendix 1 (Petitioner), at 3. The judge explained in open court that, "[T]he whole purpose of deferred sentence is so that this matter can be dismissed at end of the deferral period and be removed from any criminal record." See Appendix 2 (Petitioner), at 5. The sentence was in fact deferred for 18 months. See Appendix C (Respondent).

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[4]Please refer also to the copy of the original document, lodged with the Clerk of the Court.

B. SUMMARY OF ARGUMENT

This court should decline review in this case. The trial court was not required to conduct an oral colloquy with Mr. Wilson similar to that required where a defendant enters a plea of guilty. Mr. Wilson did not admit his guilt, but merely stipulated to facts in the police report, allowing the judge to decide his guilt or lack thereof based entirely on those facts.

Contrary to Mr. Wilson's assertion, the record is not silent with respect to waiver of his constitutional rights. The "Stipulation to Facts" signed by Mr. Wilson expressly informed him that he was giving up the right to a jury trial, the right to hear and question witnesses, the right to call witnesses in his own behalf, and the right to testify or not to testify.

Mr. Wilson received effective assistance of counsel in entering into the stipulation. The deferred sentence was a very advantageous resolution of the case for Mr. Wilson. The State agreed that, if Mr. Wilson satisfied the conditions of his probation, the charge would be dismissed at the end of eighteen months, and would thus be removed from his record.

C. ARGUMENT

1. THE PETITIONER'S CONSTITUTIONAL RIGHTS WERE FULLY PROTECTED IN THIS STIPULATED BENCH TRIAL.

a. A Trial On Stipulated Facts Does Not Raise The Same Constitutional Concerns As Does A Plea Of Guilty.

The facts of this case show unequivocally that petitioner William Wilson did not enter a plea of guilty, either directly or pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed.2d 162 (1970). Neither the Washington Supreme Court nor this Court requires that a defendant who stipulates to facts presented by a prosecutor, but who does not stipulate to his guilt, must have a full oral colloquy from the court regarding the rights he is giving up by proceeding with a stipulated trial.

Mr. Wilson was fully advised of his constitutional rights. He acknowledged by his signature that he understood that he was "giving up the constitutional right to a jury trial, the right to hear and question witnesses, the right to call witnesses in [his] own behalf, and the right to testify or not to testify." See Appendix B (Respondent).

i. Washington Supreme Court Precedent.

In State v. Johnson, 104 Wn.2d 338, 705 P.2d 773 (1985), the State attempted to prove that the defendant was a habitual criminal. In support of this contention, the State

relied on a prior conviction that was obtained after a bench trial on stipulated facts.

The defendant challenged the validity of the prior conviction, claiming that, under the circumstances, the State could not prove that he had knowingly and voluntarily waived his constitutional rights, specifically the right to confront his accusers. Johnson, 104 Wn.2d at 339.

The Court took care to point out the difference between a guilty plea and a stipulation, noting that a guilty plea is "itself a conviction; nothing remains but to give judgment and determine punishment." Johnson, 104 Wn.2d at 341 (quoting Boykin v. Alabama, 395 U.S. 238, 242, 89 S. Ct. 1709, 23 L. Ed.2d 274 (1969)). A guilty plea generally waives the right to appeal. Johnson, 104 Wn.2d at 341.

A stipulation, on the other hand, is "only an admission that if the State's witnesses were called, they would testify in accordance with the summary presented by the prosecutor." The trial court makes the determination of guilt or innocence. A stipulation preserves legal issues for appeal. Johnson, 104 Wn.2d at 341.

The Court expressly rejected the defendant's argument, finding that Johnson "did not plead guilty [to the prior charge], but rather pleaded not guilty. He executed a written waiver of jury trial, and stipulated to the facts from which the court found him guilty." Johnson, 104 Wn.2d at 343. The Court refused to impose a requirement that, in a trial on stipulated facts, the trial court must advise the

defendant of the constitutional rights being relinquished.[5] Johnson, 104 Wn.2d at 343.

The holding of Johnson was reaffirmed by the Washington Supreme Court in State v. Mierz, 127 Wn.2d 460, 901 P.2d 286 (1995). In that case, the defendant argued that he was deprived of due process when he was tried on stipulated facts without the protections afforded those who plead guilty. The Court rejected this argument, finding that "there was a true stipulated facts trial here as the trial court independently reviewed the evidence and made its own findings of fact." Mierz, 127 Wn.2d at 468-69.

The court reiterated the differences between a guilty plea and a stipulated facts trial, which is "still a trial of the defendant's guilt or innocence." The Court concluded that, because of these differences, the safeguards required for guilty pleas are not required in a stipulated facts trial. Mierz, 127 Wn. 2d at 469.

ii. The United States Supreme Court.

The petitioner herein relies on this Court's opinion in Brookhart v. Janis, 384 U.S. 1, 86 S. Ct. 1245 (1966), in support of his argument that his stipulation was the "practical equivalent" of a guilty plea. However, the holding of Brookhart is not in conflict with the position of

---

[5]In Johnson, the defendant apparently retained the right to offer evidence and cross-examine witnesses. See Johnson, 104 Wn.2d at 342.

the Washington Supreme Court, that a stipulated trial does not require the same protections as a guilty plea.

In Brookhart, there was no express waiver of the right to confront witnesses. In fact, after the trial court explicitly stated that it considered the "prima facie case" procedure to be essentially a guilty plea, the defendant protested that such was not his wish. Brookhart, 384 U.S. at 6. Under these circumstances, this Court held that the defendant "neither personally waived his right nor acquiesced in his lawyer's attempted waiver," and reversed the conviction. Brookhart, 384 U.S. at 8.

In the present case, the trial court never indicated that it considered the trial on stipulated facts to be the equivalent of a guilty plea, nor did it treat the defendant's stipulation as a guilty plea. To the contrary, the "Stipulation to Facts" specifically noted that "the Judge will read the police report and other material attached and, based upon that evidence the judge will decide if I am guilty of the crime." See Appendix B (Respondent) (emphasis added).

Furthermore, unlike the case in Brookhart, the petitioner herein explicitly waived his right to confront witnesses:

> I understand that, by this process, I am giving up the constitutional right to a jury trial, the right to hear and question witnesses, the right to call witnesses in my own behalf, and the right to testify or not to testify.

See Appendix B (Respondent).

Nor does such a waiver turn the stipulated trial into a plea of guilty. It is clear from the language of the stipulation that, should the police report fail to establish beyond a reasonable doubt an essential element of the charge of assault in the fourth degree (e.g., the intentional nature of defendant's actions, or the lack of self-defense), the trial court had the option to find the defendant not guilty. This clearly distinguishes this stipulated trial from a plea of guilty, where the court would have no such option so long as there was a factual basis for the plea.[6]

b. There Is No Conflict Among The State Courts Of Last Resort On Constitutional Issues In The Context Of Stipulated Trials.

Mr. Wilson cites several state court decisions in support of his argument that the states are divided on this issue, and are thus in need of guidance from this Court. Careful analysis of the cited decisions shows that no such conflict exists.

In People v. Smith, 59 Ill.2d 236, 319 N.E.2d 760, 762 (1974), the defendant waived jury trial and chose to proceed by way of stipulation. Pursuant to this procedure, both sides stipulated that "the facts as presented are sufficient under the law to find the defendant guilty of the crime charged beyond a reasonable doubt." Smith, 319

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[6]A finding of a "factual basis" for a plea of guilty clearly falls short of a finding that the evidence establishes each element of the crime beyond a reasonable doubt.

N.E.2d at 762 (emphasis added). The Supreme Court of Illinois, noting that "[t]he record reflects that the stipulation was designed to establish guilt beyond a reasonable doubt," held that "[u]nder such circumstances counsel's action was tantamount to a guilty plea on behalf of the defendant without the requisite admonishments." Smith, 319 N.E.2d at 764.

Contrary to the petitioner's representations, there was no stipulation in the present case to facts sufficient for a finding of guilt. The holding in Smith is not in conflict with the holding of the Washington Supreme Court.

The decision in Bunnell v. Superior Court of Santa Clara County, 119 Cal. Rptr. 302, 531 P.2d 1086 (1975), is similarly inapposite. In that case, the court described the stipulation procedure used as "unusual and ambiguous," and pointed out that the defendant "insisted that he wanted to have a trial and to testify." Bunnell, 531 P.2d at 1090 n.3. The judge warned the defendant that the "result is already decided." Bunnell. 531 P.2d at 1090 n.3.

Faced with these circumstances, the Superior Court held that, where a defendant seeks to submit the case on the transcript of a preliminary hearing, the record should reflect that he or she was advised of the right to a jury trial, to confront and cross-examine witnesses, and against self-incrimination. Bunnell, 531 P.2d at 1094. The court based its decision in part on independent state grounds, noting that "some of our requirements are not constitutionally compelled," and pointing to the benefits of assuring criminal defendants the "full panoply of constitutional and statutory rights." Bunnell, 531 P.2d at 1094, 1095 (emphasis added).

As in Smith, it is clear that the conclusion of guilt was automatic in Bunnell. The position of the California court is not in conflict with the position of the Washington Supreme Court.

These decisions make it clear that there is no single procedure that constitutes a "stipulated trial." While procedures vary among the states, in none of the cases cited in the Petition were the constitutional rights of the defendant violated.[7] Further guidance from this Court is not required.

2. THE PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL IN REACHING A RESOLUTION OF THIS CASE THAT ALLOWED THE CONVICTION TO BE REMOVED FROM HIS RECORD AFTER EIGHTEEN MONTHS OF COMPLIANCE WITH CONDITIONS OF PROBATION.

Petitioner Wilson next argues that his counsel was ineffective in advising him to enter into the stipulation to facts that resulted in his conviction. He claims that counsel did not accurately inform him of the consequences of his actions, and complains that he now has on his record a criminal conviction for assault, a consequence that he wished to avoid.

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[7]Petitioner cites State v. Avila, 127 Ariz. 21, 617 P.2d 1137 (1980), as an example of a decision "holding safeguards inapplicable." To the contrary, the court in that case held that, in a stipulated trial, a defendant must be informed of his constitutional rights. Avila, 617 P.2d at 1140-41.

This claim fails. The resolution negotiated by his attorney allowed Mr. Wilson to avoid serving any time in jail and, more importantly, provided for the dismissal of the charge and the removal of the conviction from his record if he complies with the conditions of probation for eighteen months. Under these facts, Mr. Wilson can show neither substandard performance on the part of his attorney, nor prejudice resulting from that performance.

The test to determine whether a defendant's conviction must be overturned for ineffective assistance of counsel was set forth in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984):

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

(Emphasis added.)

There is a strong presumption of adequate assistance of counsel. Strickland, 466 U.S. at 689. To satisfy the

prejudice requirement, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

Mr. Wilson cannot meet either part of this test. First of all, his attorney performed effectively on his behalf in negotiating this resolution. The State was prepared to go to trial. While there is certainly some chance of acquittal in any criminal trial, such a result is far from certain. In the face of this uncertainty, Mr. Wilson's attorney was able to arrange for him to stipulate to the facts contained in the police report, in return for a recommendation of a deferred sentence if he were found guilty by the court.

Mr. Wilson received, in effect, exactly what he now claims he wanted -- the chance to clear his record of this criminal conviction. All he is required to do, under the terms of this sentence, is to comply with the conditions of his probation for eighteen months. If he successfully completes his counseling, avoids further criminal convictions, and pays the $100 fine imposed, this conviction will be removed from his record at the end of the eighteen-month probation period. Such a favorable resolution cannot be deemed the result of ineffective assistance of counsel.

Nor can Wilson show prejudice. He does not even attempt to provide this Court with a basis to conclude that, had he proceeded by way of jury trial, he would have been found not guilty of the assault.

D. CONCLUSION

William Wilson's constitutional rights were fully protected in the stipulated trial below. His simple stipulation to the facts contained in the police report, where the court would find him guilty or not guilty based on those facts, was not the practical equivalent of a guilty plea. The stipulation thus did not trigger all the constitutional safeguards required where a defendant does plead guilty.

Furthermore, Mr. Wilson was informed of his constitutional rights, and he validly waived them by signing the stipulation form.

Nor has Mr. Wilson shown that his counsel was ineffective. The outcome of this case, highly advantageous to Mr. Wilson, demonstrates clearly that counsel performed effectively, and that Mr. Wilson received considerable benefit from his counsel's performance.

For the foregoing reasons, the State respectfully requests that this Court deny William Wilson's petition.

DATED this 6th day of May, 1996.

Respectfully submitted,

NORM MALENG
King County Prosecuting Attorney

By:_____
THERESA L. FRICKE
Senior Prosecuting Attorney
WSBA #16549
Counsel for Respondent

By: _____
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No. 95-1101

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

WILLIAM P. WILSON, *Petitioner*

v.

STATE OF WASHINGTON, *Respondent.*

APPENDIX

to the

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF KING

Theresa Fricke
Senior Prosecuting Attorney
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APPENDIX
Table of Contents

Document	Appendix No.
Report of Proceedings Dated April 22, 1994 and May 19, 1994	A
Statement of Defendant on Submittal Or Stipulation To Facts dated January 13, 1994	B
Order on Judgment, Sentence And Probation For The Crime(s) Of: 1) Assault DV dated January 13, 1994	C

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	RALJ APPEAL
	)	NO. 94-1-03624-2
vs.	)	
	)	
WILLIAMS P. WILSON,	)	
	)	
Appellant.	)	
	)	

REPORT OF PROCEEDINGS

THE HONORABLE TIMOTHY SULLIVAN, PRO TEM

Attorney for Plaintiff (Atp): Gwen Skinner

Attorney for Defendant (Atd): Joan Neuffer

Transcriber
Charlotte Corbley

TAPE 94-202, COUNTER 2982 - April 22, 1994 (single track tape)

Atp: If we could perhaps take the matter of the State vs. William Wilson matter next your honor.

Atd: Good morning your honor. Joan Neuffer for Mr. Wilson. I'd like to hand to the court a short transcript of the tape that I was referring to in my motion. It might be easier for you to review that.

Judge: Okay.

Atd: I have also handed to Miss Skinner a copy of that same transcript.

(pause)

Atp: I would like to be heard on this your honor. I have reviewed the tape as well and agree that, that is accurate.

(long pause)

Judge: What's the, just as an original matter, what is the position of the parties with respect to whether or not this matter should be addressed properly to Judge Pro Tem Rusden?

Atd: Your honor I did contact the court clerk through a letter requesting that if Judge Ottinger, if Judge Ottinger would allow Judge Rusden to come back and look at this. And the court clerk called me

back, that's not going to be as easy to be, as you might think and that would you have any objection if Judge Ottinger heard this? I said that, "I have no objection to that. I just thought it might be appropriate to have Rusden come in." So I think the decision was made by Judge Ottinger and the bailiff. And I do have a letter inquiring of that if the court would like to see that.

Judge: Okay.

(pause)

Atd: I'll just show the court that inquiry so that you're aware of what...

Judge: (unintelligible 3434). I have a copy of this. Actually I have the original I think in the court file.

(very long pause)

Judge: Counsel why don't I hear from defense first with respect to the motion.

Atd: Okay. Thank you. Your honor I realize that this is a little unusual since there was already a stipulation and a finding, in fact a sentence, but I think under the rule 4.2 it clearly requires that that plea, in fact in this case the Alford Plea be voluntary and the court, stating that the court shall acc', accept a plea of guilty without first determining that it was made voluntarily. And that's when I took a look at the tape in this case. There was another attorney on the case previously. I took a look at the tape and listened to it and I can't find anything on the tape that indicates that my client was advised of the fact that he was giving up certain rights and that the police report would be admitted. I understand he had, had counsel but from what Mr. Wilson tells me, it was, they had a very hard time communicating and he did not understand what he was signing. Um, I, I believe that if Judge Rusden had gone through the advisement of rights as required by the rule that perhaps Mr. Wilson would have refrained from signing of document and maybe would have inquired of his counsel a little bit more carefully or perhaps his counsel would have advised him. In this case he also was not advised of any rights to appeal, which is, which in the case of an Alford Plea it is possible to appeal that finding. And by the time he found

out that he had 14 days to appeal, that time had passed. Now rather than to go to the superior court, we would request that this court handle it here and make ruling on whether the, the findings should be vacated so then he can proceed either through superior court or proceed to a jury trial. Our preference is to proceed with a jury trial so that he can retain all of his rights under, under the law. And that the case can hear, the court can hear the case on its merits. It's my understanding that um, the, as far as I understand the State hasn't been compromised or prejudiced in having to go through another trial or at least attempt to go through another trial. And your honor I'd request that um, that we look at this case with uh, in fairness to the defendant and in fairness to both sides, but especially to Mr. Wilson who apparently did not have the, the advise

or did not understand what the advise for that stipulation and Alford Plea.

(very long pause)

Judge: What's the State's position?

Atp: Well a couple things your honor. Um, and I'm not sure exactly how I am going to proceed. I am going to be looking to the court for some guidance. First of all I have also listened to the tape and um, defense counsel's portrayal of it is accurate. And the State concedes that these specific rights probably should have been put on the tape and in normal circumstances...

Judge: What specific rights should have been put on the tape?

Atp: The rights that the defense counsel is giving up, you know, the things that are gone over when there is submittal. However, and in the most cases I think the State would not oppose such a motion like this. Now I understand in this particular, well, let me say this. The court order, or the court rules basically say that it's in your honor's discretion to vacate an order if there has been a manifest injustice. It's the State's position that in this case it does have evidence that rebuts the fact that this was a manifest injustice or that Mr. Wilson did not understand the rights he was giving up. Now I understand that current defense counsel wasn't privy to the certain things that

occurred at the time and is only going on the information that she has from Mr. Miller and the defendant. I was privy to some of the talks and negotiations. I can tell you that some of the things that at put, not only Mr. Wilson's affidavit, but in the motion by defense counsel are just simply not true. Now I can either the court the version of events from the State's point of view. I have a witness, Kimberly Gruninder, who is the victim's advocate in our office. She is on vacation. If the court is going to require corroboration of what I would like to tell the court, then I would like to continue so that she can testify, 'cause I know that she will corroborate what I am about ready to tell your honor. Now, if it's your honor's position that it doesn't matter about what other evidence the State has just by the mere fact it's not the certain colloquy isn't on record, I won't waste the court's time. But if the court would like to hear what

happened from the State's point of view, I would like to tell your honor.

Judge: Well I think I would like to have a complete record.

Atp: Okay. Um, I, this occurred I think on January 13th of 1994, if my recollection is correct. At this point the charges against the defendant have been pending since I think September from the earlier year. So at this point he would have had case pending for five months. He had been represented by Mr. Miller for several of those months so it's not like this just happened over night. But in any event on the 13th Mr. Miller approached myself and Kim Gruninger who is our victim's advocate, about S.O.C. saying that the defendant wanted to enter into an S.O.C. What we told him at that time because our office's..

TAPE 94-202, COUNTER 77 (single track tape, side two)

Atp: ..position, is that the defendant was no longer eligible for the S.O.C. 'cause we only offered it at the time of arraignment. This particular person, Mr. Wilson, was offered the S.O.C. on two different occasions as a matter of fact and declined on both occasions. Because we declined the S.O.C., Mr. Miller asked us then to consider a deferred sentence. We had done very specific negotiations about what that deferred sentence would entail. It's normally our office's position that that deferred sentence entail 18 months of

domestic violence treatment approved by probation. However at the time, Mr. Wilson was seeing a specific person, who was a counselor, and after negotiations it was agreed that he could go, go along and continue to have treatment with that particular counselor. I was there when his attorney began going over the stipulation form with him. I was not present the whole time so I am not sure what occurred. The other thing that is not true is the statement that the State was not ready to proceed. Indeed we were ready to proceed. The witness had flown in specifically from Chicago on that day to testify. It's my understanding, albeit from hearsay, that it was Mr. Wilson himself who picked her up at the airport that morning. At least that's what she told our office. I'm not sure if it's true. That's just what we've been informed. And in any event she was on the phone. She was about ready to come in. Once we reached this agreement we told her that she didn't have to, but

she was prepared to testify. When Mr. Wilson knew that, that she was here and prepared to testify, that's when he decided to enter into the stipulation. He was prepared to do that because he didn't think that she was going to show up. Once he realized that she was, he decided that he wanted to enter into the deferred sentence. Now obviously I can't know what occurred between he and his counsel, but just that we had specific discussions with counsel in the presence of Mr. Wilson, about the deferred sentence and what it meant and the fact that we were willing to allow him to continue treatment with that particular individual. And he did sign the submittal which of course talked about the different rights that he's giving up, that he is giving up the constitutional right to a jury trial, the right to hear and question witnesses, the right to call witnesses in his own behalf, and the right to testify or not to testify which is clearly delineated on the submittal form which he did sign. He had the benefit of counsel at this time, at this time and for several months. I don't think that there was manifest injustice in this particular case. And the State would ask your honor to deny the defense motion.

Judge: Can you address the issue, and in fact I would like both counsel to address the issue with respect to the right to an appeal? The right to appeal, finding of guilty, is not something that is on the Statement of Defendant on Submittal or Stipulation to Facts.

Atd: I can address that.

Judge: If counsel could identify court rules and/or cases with respect to the obligation of the court affirmatively upon the entry of a stipulation to advise the defendant of a right to appeal from a finding which is entered after review of the police report. Counsel you look, maybe I should let defense go first. Counsel you look like you're looking through the rules and...

Atd: I think it's 7.2, and if you can...

Atp: CrRLJ?

Atd: If you can um, if you can handle me the book? My rule book is, I mean that's kind of a wild guess.

Atp: Just for the court's (unintelligible 576) your honor it wasn't the understanding of the State at this time that it was an Alford Plea. It was the understanding that it was a submittal or stipulation.

Atd: Well actually it is a stipulation. I've got a copy of the former...

Atp: But um...

Atd: As soon as you're done Miss Skinner I'd like to address the court on a couple of points.

Atp: Sure.

Atd: If I'm, if the court allows. Are you finished?

Atp: Yes I am.

Atd: Okay. 7.2, CrRLJ 7.2(b) um, uh, (2), that unless a notice of appeal is filed within 14 days after the entry of the judgment and sentence or order appealed from, the right to appeal is waived. Um, that, that should take place at the time of sentencing and I know that there's a form that this court gives out uh, in lieu of perhaps um, doing that from the bench, but there's a form that is usually given out. In fact I have a copy of it, that advises a defendant of his right to appeal on the day he's sentenced, on the day of the entry of the conviction or whatever, but on, actually on the day of sentence. And from that point he's got 14

days after the, the day of the event which starts the next day.

Judge: Did Mr. Wilson receive one on that day?

Atd: No he didn't. In fact he came back several days later, as I understand he came back to the court and started asking some questions about his right to appeal and by that time it had passed is my understanding.

Judge: Okay. Do you have a copy of the form?

Atp: I think I do. Let me check.

(rustling of papers and background whispering - unintelligible 800)

Atd: I think there might be one at the front counter of the clerk's office.

Judge: (unintelligible 867)

Atd: I can, I can go get one your honor. I think there is one over there in the file.

Clerk: What are you looking for?

Atd: Just the Notice of Rights to Appeal. In fact I might have put it in my file, my other file, but...

Clerk: I can get what we hand out at the front counter.

Judge: That's fine. Sure.

Atd: I just want to briefly address some of the...

Judge: It might be better if you hold off because she usually makes notes. You go do your thing. But she, she busily types away and makes notes.

Atd: Sure.

Judge: It would be better to....

(long pause)

Clerk: This is what we would hand out at the front counter.

Judge: Okay. Counsel is this the form you're referring to?

Atd: Yes it is.

Judge: Why don't we have this marked as an exhibit then?

Atd: This is a defense exhibit? If you'd like to mark the transcript as one of the exhibits that would probably be helpful.

Judge: I have the transcript up here.

Atd: The original.

Judge: Oh, you have the original?

Atd: I gave your honor the original.

Judge: Oh, I have the original. Okay. That's fine. You can mark that as an exhibit.

Clerk: But may this be marked your honor?

Judge: Yes.

(pause)

Judge: Okay. Do you have...

Atd: Sure.

Judge: Try another shot at it counsel.

Atd: Your honor I think the distinction needs to be made here that if there is an S.O.C. that entry, that order does not involve a plea of guilty here. And from, if there were negotiations with regard to an S.O.C., one was entered into. And the difference between an S.O.C. is that you maintain your plea of innocence, whereas with a deferred sentence you make a stipulation or you do a straight plea of whatever. And if Mr. Wilson was under, under the impression that he was going to go forward on some kind of a disposition that involved maintaining his innocence then I think that he would agree that that was the goal. Apparently there was some change in the disposition at some date that either Mr. Wilson didn't understand what he was doing and what was occurring or that he thought that he was in fact maintaining the S.O.C. status. Apparently that is not what took place. Um, I don't know what the situation was with who brought whom from the airport. I have not heard that. And I would ask the court to strike any hearsay statements from counsel that, without backing those statements up. It's our position that under the rules Mr. Wilson is required to have those rights explained to him by the court and hopefully by his counsel. If counsel did not explain that to him or he didn't understand what he was doing, then the court should have at least gone through those rights with Mr. Wilson. It's been my experience in the courtroom that the court, the judge does go through those statements and asks the defendant, do you understand you're giving

up your rights to call witnesses? And do you understand that it's likely that I will find guilt in this case and so forth. And there is nothing in the records that indicates that the court did that or that he was advised or given any rights to appeal or given the information he needed to find out what his rights to appeal were. Mr. Wilson was pretty confused at that point.

Judge: Let me narrow the issues. Uh, the, the only issue that I am focusing in on at this point here is the narrow issue of the advisement of a right to an appeal. I find that the defendant's statement in the case here, is the acknowledgment that he's giving up certain constitutional rights and that he understood that the judge was going to read the police reports and other material attached and based upon the evidence the judge will decide if I'm guilty of the crimes of assault in the fourth degree." I think that the defendant has not made an adequate showing with respect to not uh, as to any suggestion that he didn't understand what he signed, what he stated. What I am concerned about however, is the court's obligation, as counsel has indicated, under 7.2 and it's not the prosecutor's obligation nor is it the defense counsel's obligation, it's the court's obligation under 7.2. "The court shall at the time of sentencing, unless the judgment and sentence are based on a plea of guilty, advise the defendant number one, of the right to appeal the conviction pursuant to RALJ 2.7, Criminal Rules for Limited Jurisdictions 9.1. Counsel could you address that

issue because that is the one that I am frankly having problems with.

Atp: Yeah I understand your honor and unfortunately I only know at this point what the rule says. I can just ask your honor for perhaps for a week to be able to brief the issue to see if there is any case law out there, to what extent a stipulation is considered a guilty plea; to what extent the remedy is. Um, I apologize that I wasn't more prepared for that particular issue this morning, but I would like a chance to do some research.

Judge: Okay.

Atd: There is a case law that indicates what a stipulation is and when it is appealable. It is on the day of, entry of the deferred "sentence". So, and I can produce that...

Judge: I have no doubts that an order deferring imposition of sentence which is what a deferred sentence is still an appealable event on the stipulation. I don't have any doubt about that.

Atd: I think it's the Strickland, but I'll, I'll get you that, I'll get that to you if you need it your honor. I think it's State vs. Strickland.

Judge: I think I would in fairness to the prosecution like to give them an additional week or it may take a little bit longer than that, because I am not going

to be back, unless you want someone else to hear it. That's fine. I don't really mind.

Atp: It doesn't really matter to me your honor.

Judge: We may have to set it specially then or, in order to accommodate schedule counsel.

Atd: Is the court, is the court making some kind of a ruling with regard to the applicability of 7.2 at this point or we just looking for some caselaw to support the rule or is there, is the court making a finding?

Judge: No what I'm, what I'm concerned about at this point here is that it would appear that there's evidence on the record that the defendant was advised of his right to appeal, the factual finding which was reached in this case here by Judge Rusden, on that date that the stipulation came in and the judge made a finding at that time of guilt. And what I am concerned about is that the record is devoid of any suggestion that the court complied with the requirements of rule 7.2(b) and if that is the case, and unless the prosecution can come up with some wonderful cases, you know, in this case here which indicates that somehow the court didn't have an obligation affirmatively to do it in this case, I'm inclined, I am inclined to grant the defense motion to vacate it.

Atd: Okay. So...

Judge: So we're just continuing for uh, basically legal research at the prosecutor's request to see if there is someway you can try to keep this one from the fires. Okay.

Atd: Is, is the, let me inquire for just a moment. Is the prosecutor's position that the court doesn't have an obligation to advise or are just waiting to...

Atp: I'm not (unintelligible 1992).

Judge: (unintelligible 1996) counsel. I mean I appreciate that you want to be, put your best foot forward, but I'm going to allow the prosecution some time in this case here to take a look at it, reflect on it. If there is some way, if the prosecutor agrees that a silent record is inadequate, you know, and based upon an unrebutted, you know, affidavit of Mr. Wilson, that's not to say that the prosecution, since they've vacated, since this is attempt to vacate a plea, my understanding of the rule is that the prosecution has the right to call defense counsel, defense, the defendant by doing so waives his right to uh, confidentiality, attorney/client privilege as to the advisement. And I remember the old cases, State vs. Hallsworth and other cases with respect to attempts to collaterally attack guilty pleas. The State may have some evidence that they can produce at a subsequent hearing, but if the State, after reviewing the record and any cases, whatever, wishes to concede error, then this case, and it's not the prosecutor's error at all, it's the

court's error in this case here, then we'll take a look at it. So we're going to continue it. Let's, we'll specially set it then. Okay.

Atd: Can I ask one other question your honor?

Judge: Sure.

Atp: Does the remedy automatically follow though that that means he can vacate his guilty plea?

Judge: I don't think that there is any other choice. If he's not advised or it, of his right to an appeal and the appeal period is gone at this point, unless there is somehow you can assure the court that the, that he's going to have an absolute right...

Atp: No.

Judge: ..that the superior court is consider his RALJ appeal in this case here I don't see how else...

Atp: We'd have to go through two hoops.

Judge: I don't know what other relief is available to the defendant at that point.

Atd: Do we have a time line or, so that we know when you send me your brief or whatever?

Judge: Well I, I would like to see the prosecution prepare any materials within 10 days. Is that fair enough counsel?

Atd: I think so. Okay.

Judge: Give them 10 days. So that would be a week from Monday and then we'll schedule the hearing for some time after that. Counsel we may not be able to do the scheduling right now. We may have to call you with the schedule.

Atd: That's fine.

Judge: Because it may be that I'll come on back for that and it going to depend upon my scheduling as well.

Atd: Okay.

Judge: So we'll do that, but we'll, and Mr., get his name right here.

Atd: Wilson.

Judge: Mr. Wilson. I apologize. We have so many files that I put them away. Mr. Wilson has an absolute right to be present. He can also waive his presence at that hearing and you advise him of that and advise the court at the next hearing as to whether he waives or not.

Atd: Okay.

Judge: I don't want to prejudice him any further than necessary by requiring him to show up for

duplicative court appearances, counsel are paid to do.

Atd: Thank you your honor.

COURT TAKES UP ANOTHER CASE

TAPE 94-251, COUNTER 786 - May 19, 1994 (single track tape, side one)

Judge: And counsel is present. Could you introduce yourself for the record?

Atp: Yes your honor. Gwen Skinner for the State of Washington.

Atd: I can just barely hear you all.

Judge: Okay. Ms. Skinner maybe you can come over here.

Atp: Okay.

Judge: 'Cause it is more important. We're going to actually tape it right here on the record. So you can be right here, okay. This matter is before the court on a motion for, a motion to vacate findings and reinstate right to jury trial. The matter was continued for a hearing. The prosecutor was given additional time in this case to file a response to defendant's motion to vacate finding. Miss Neuffer have you had a chance to take, to read that document and review it?

Atd: Yes I have.

Judge: Any response to that, or any reply orally at least to the response filed...

Atd: Yes I do have a response to that. Both cases that Miss Skinner cited were cases which consist, considered the issue after the notice of appeal had been filed, in fact the superior court were involved in deciding whether or not that remedy was proper. At this point, we don't have any involvement of the superior court. They don't have jurisdiction to determine anything. We are right now at the district court level. And I think that 7.8 in the Courts of Limited Jurisdiction rule allows relief from judgment or order. And that relief can be based on, you know, whatever is appropriate in that case. I don't read Braggs or Lewis as saying that the sole remedy is to proceed to the superior court with a late filing. I think the court can do what it feels is necessary to, to right the wrong. Uh, I think 7.8 provides for the court to have the discretion to give him another shot at this thing.

Judge: Okay.

Atd: And, like I said, I don't see Braggs or Lewis saying that he cannot do this or the court cannot rule this way. I think 7.8 outlines the procedure and I think there's been a problem with, with the compliance of 7.2 and the court, the court has the

authority to do that. I don't see anything in my research that indicates otherwise.

Judge: Okay. Miss Skinner of behalf of the State?

Atp: Thank you your honor. First of all if we could just get a point on clarification. Part of this motion came up before your honor, I don't know how long ago it's been now, maybe 60 days or 45 days ago and um, the court found that the vacation for purposes, for reasons of inadequacy of counsel or not voluntariness of entering into the submittal um, your honor, denied that motion. You found that this particular defendant knew what he was doing, adequately understood the rights that he was giving up when he entered into the submittal. So the only issue now is whether or not because of the fact that the pro tem judge at the time, didn't tell him about his rights to appeal, what the sole remedy is for that. And that's really the only issue in front of the court today. There is no case law that exists that I could find where, you know, to address the issue (unintelligible 1229) before it was filed, the notice of appeal. But I think that the analogy and the reasoning of those cases fits this and I think that it's exactly the same. And it's pretty clear to me that those cases say where the defendant was not told about his rights to appeal, the correct remedy would then be to extend the time for which the appeal can take place, not simply to vacate. I mean the finding was made. And they found that the introduction to the submittal was voluntary. I

think that now to then allow the defendant to withdraw that, based on (unintelligible 1307) issue, the fact that he wasn't given the right to appeal, I think is the incorrect remedy. The remedy would be then to let him have his appeal.

Judge: Okay. Final reply Miss Neuffer.

Atd: Yes. I do have a reply. I, I think we can't make a decision, this court can't make a decision based on what it thinks the superior court might do or the superior court might allow. The question is before your honor and uh, 7.8 allows you to, to give the defendant relief from a judgment/order and we are not even considering the voluntariness issue any more. To allow the court to give relief from judgment or order for sufficient (unintelligible 1399). Any other reason justifying relief from the operation of the judgment.

Judge: Okay.

Atd: I don't think Braggs or Lewis precludes the court, the district court from making that, from vacating this, this finding.

Judge: Okay. I find that it is a discretionary call. I find that the Braggs, Lewis, Sweet and Adams cases are persuasive to the court. I'm going to deny the motion to vacate. I'm going to, specifically it is going to be in the record in this case here that the State has contended that the proper remedy in this case here is the defendant having additional 14

days from which to file his appeal. Should the State take in a subsequent appeal filed by the defendant in this matter, a contrary position, and the matter is dismissed, it would come back to this court and the court would consider what it should do at that time. But at this point, I think that I am going to deny the motion. Thanks.

Atp: Thank you your honor.

Atd: Can we have an order or uh, I guess what we need is an order so that we know when the 14 days starts.

Judge: Okay. What we'll do is this. I'll direct that the clerk send to you and to your client a copy of the docket associated with this finding. The defendant will have 14 days after the docket, actually let's do this. If, 14 days from today. We'll get this docket to you tomorrow, uh, in which to perfect his appeal.

Atd: Okay.

Judge: Okay. Thank you very much.

Atd: Thank you your honor.

Judge: Bye.

COURT TAKES UP OTHER MATTERS

I certify, under penalty of perjury of the law of the State of Washington, that the foregoing is true and correct to the bet of my ability.

Dated this 17th day of October, 1994, in Seattle, Washington.

/s/ Charlotte Corbley
Charlotte Corbley
Transcriber

State of Washington
Issaquah Division
640 N.W. Gilman Blvd.
Issaquah, WA 98027
296-7688

STATE OF WASHINGTON,
COUNTY OF KING,
CITY OF _____
_____
Plaintiff,
v.
WILLIAM P. WILSON,
Defendant.

Case No. L098433
~~STATEMENT OF DEFENDANT ON SUBMITTAL OR~~
STIPULATION TO FACTS

I am the defendant in this case. I wish to submit the case on the record. I understand that this means that the judge will read the police report and other materials attached and, based upon that evidence, the judge will decide if I am guilty of the crime(s) of Assault 4 o DV.

I understand that, by this process, I am giving up the constitutional right to a jury trial, the right to hear and question witnesses, the right to call witnesses in my own behalf, and the right to testify or not to testify.

I understand that the maximum sentence for the crime(s) is 1 year jail/$5000.00 fine.

I have been informed and fully understand that the crime(s) with which I am charged carries a mandatory minimum sentence(s) of: N/A and that the judge can

impose any sentence up to the maximum, no matter what the prosecuting authority or the defense recommends.

No one has made any threats or promises to get me to submit this case other than the prosecuting authority's promise to take the following action and/or make the following recommendations:
18 months deferred sentence/no criminal law violations/active probation with King County/domestic violence counseling with Dr. Philip Cohen, or another counselor recommended by him, unless not approved by Probation with good cause. If not approved, then an approved domestic violence program. Jail time suspended; $4900 fine suspended. If all conditions are fully satisfied, the case will be dismissed at the end of 18 months.

Dated this 13th
day of January,
1994.

/s/ William P. Wilson
Defendant

/s/ JAMES RUSDEN,
JUDGE

/s/ Phillip Miller
Lawyer for Defendant

/s/ Gwynne Skinner
For the Prosecuting Authority
#91002

King County District Court
State of Washington
Issaquah Division

STATE OF WASHINGTON,	)	NO. 98433
COUNTY OF KING	)	ORDER ON
CITY OF _____	)	JUDGMENT,
Plaintiff,	)	SENTENCE
vs.	)	AND
WILLIAM P. WILSON,	)	PROBATION FOR
Defendant.	)	THE CRIME(S) OF:
_____	)	1) ASSAULT DV
		2)

The defendant having been found guilty of the charge(s) and appearing for sentencing, IT IS ORDERED, AND ADJUDGED AND DECREED THAT:

_x_ Sentence be deferred for a period of 18 months for Count(s) ___ on the following conditions:

___ The Court sentences the defendant to:

Count 1) 90 days jail and susp. 90 days; and $500 fine and susp. 400 fine

2) ____ days jail and susp. ____ days; and $____ fine and susp. ____ fine for a period of ___ months on the following conditions:

/JAIL/

___ Serve a total of _____ days in jail with credit for ____ days served

___ concurrent with all other commitments ___ North Rehab. Facility ___ No home detention

___ consecutive with all other commitments ___ No Work Release ___ No credit for time served

/FINE/

___ Pay a fine of _____ $100.00

_X_ includes the assessments/costs _____ _____

___ plus costs _____ _____

___ plus assessments _____ _____

TOTAL $100.00

/ADDITIONAL CONDITIONS OF DEFERRAL/SUSPENSION/

_X_ Have no violations of law during this period.

___ Not use alcoholic beverages or non-prescribed drugs.

___ Not drive any motor vehicle without a valid license and insurance.

_X_ Be placed on probation with the King County District Court Probation Department for 18 months and abide by all terms, conditions, rules and regulations of the Probation Department for your conduct during this period.

___ Pay: Pre-Sentence Fee and Monthly Probation Fee as determined by Probation Office.

___ Attend and complete the following program(s) within ___ days (Proof of completion must be fiied).

___ Driver Improvement School ____ Alcohol Information School ___ Consumer Awareness

___ DV Counseling/Treatment ____ Anger Management

___ Attend Alcohol/Narcotic Anonymous meetings ____ times a week for ____ months.

___ Complete ___ hours of community serve within ____ months, in lieu of $_____ of fine, and file

proof of completion (Community service credited at the rate of $_____/hour).

___ Pay restitution in the amount of $_____ by _____ to _____ and file proof of completion.

___ Not contact, associate with, or go upon property of _____.

___ Bail/Bond in the amount of $_____ is exonerated.

___ Attend and complete: ____ SP1 ____ SP2 ____ In Patient ____ Out Patient (and complete the follow-up requirements).

_X_ Complete a program through Dr. Phillip Cohen and follow all rec. Probation may review appropriateness of Dr.'s program. Dr. Cohen may rec other counselling.

___ Court recommends driver license not be suspended.

___ Defendant is ordered to return for a review hearing on _____.

I have read the rights, conditions & warnings on the reverse side of this form.

DONE IN OPEN COURT this
13th day of January, 1994.

/s/ William P. Wilson
Defendant's Signature
Date of birth: _____

/s/ JAMES RUSDEN
Judge/Court Commissioner

Ste M-153 16625 Redmond Way
Address

/s/ Phillip Miller
Defense Attorney

DECLARATION OF DEBORAH A. DWYER

I, Deborah A. Dwyer, declare as follows:

I am co-counsel for the respondent, State of Washington. My legal secretary has prepared all documents contained within the Appendix to the Response to Petition for a Writ of Certiorari, which were a part of the record below.

I have compared the following retyped documents with the originals, and find them to be accurate:

1. **Report of Proceedings**, April 22, 1994 and May 19, 1994

2. **Statement of Defendant on Submittal or Stipulation to Facts**, January 13, 1994

3. **Order on Judgment, Sentence and Probation For The Crime(s) of:**
   1) Assault DV, dated January 13, 1994

I SWEAR UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

Dated this 2nd day of May, 1996.

Deborah A. Dwyer

DEBORAH A. DWYER